In t[1] preme Court of the United States

OCTOBER TERM, 1976

No. 76-1313

KENNETH LEROY HOWARD,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

76-1313

ON PETITION FOR WRIT OF CERTIORARI TO THE THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

Petitioner's conviction was affirmed by the Court of Appeal of the State of California, Second Appellate District, Division Three on September 22, 1976. After rehearing, the opinion was modified and the judgment again affirmed on October 29, 1976. The opinion was certified for publication. (Appendix A.) *People v. Howard,* 63 Cal. App.3d 249, 133 Cal. Rptr. 689. The California Supreme Court denied a Petition for Hearing on December 22, 1976. (Appendix B.)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether California Penal Code section 12021, which prohibits possession of a concealable firearm by a person formerly convicted of a felony, is unconstitutional as depriving a person of liberty and property without due process of law.

2. Whether a person may be convicted for a violation of section 12021 of the California Penal Code absent proof the person had knowledge of his status as a convicted felon.

3. Whether the police properly seized petitioner's firearms absent specific knowledge that petitioner's possession of that firearm was illegal.

4. Whether the consent to search his home given by petitioner was valid under the circumstances presented.

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, State of California, petitioner was accused of possession of a concealable firearm in violation of California Penal Code section 12021, and of possession of marijuana in violation of section 11357 of the California Health and Safety Code. (CT 32-33.)

Petitioner's pretrial motion to suppress guns and marijuana as evidence was heard as a part of the preliminary examination and denied. (CT 48.)

Trial was by a submission of the issue upon the transcript of the preliminary hearing to the trial court without a jury. A renewed motion to suppress evidence was therein incorporated. Additional testimony was presented. The motion to suppress evidence was denied. Petitioner was found guilty of possession of a concealable firearm by a convicted felon in violation of California Penal Code section 12021, as charged. Petitioner was found not guilty on the marijuana charge. (CT 53.)

Petitioner's motion for a new trial was denied. After probation was denied, petitioner was sentenced to serve 60 days in the county jail. Bail pending appeal was granted. (CT 58.)

On appeal, petitioner's conviction was affirmed by the Court of Appeal for the State of California, Second Appellate District, Division Three. (*People v. Howard,* 63 Cal. App. 3d 249, 133 Cal. Rptr. 689 (1976).) The California Supreme Court denied the petitioner's Petition for Hearing on December 22, 1976.

The instant Petition for Writ of Certiorari was filed on March 21, 1977.

STATEMENT OF FACTS

On the afternoon of March 17, 1975, Los Angeles police officers went to an apartment building on Kingsley Avenue to investigate tips received from two informers that a Black male by the name of Howard [petitioner] was selling heroin and using a certain apartment as a "shooting gallery," which was a place where addicts would inject heroin. Admission to the hallways of this building could be gained only through a locked door opened by key or buzzer activated by someone in an apartment. The officers did not use a key or seek a buzzer signal from any occupant. Instead, they simply entered the building at the same time someone else opened the door thereof. One of the officers, however, testified that the managers of many security buildings in the area, including petitioner's building, had given the police keys to the outside doors. (CT 6-7, RT 9, 11-12, 13.)

The officers went immediately to petitioner's apartment, identified themselves and their purpose, and asked to come inside. Petitioner replied, "Come on in." Once inside the offi-

cers asked for and received petitioner's permission to search the apartment. (CT 7-8, 10, 16.)

The search revealed marijuana, a rifle, and a Colt revolver. Petitioner admitted possession of the revolver. All of these items were seized. One of the officers testified that although he had no specific knowledge that the guns were stolen, it had been his experience in narcotics investigations that guns discovered frequently turned out to have been stolen. (CT 11, 14, 20.)

Testifying in his own defense, petitioner stated that he had not given permission to the police to search the apartment. Petitioner admitted that he was the registered owner of both firearms, but claimed to have no knowledge that they were at the Kingsley apartment. He had purchased the firearms before he was arrested and convicted of a felony (possession for sale of heroin) and said he had no knowledge that he was thereafter prohibited from owning them. (CT 25-30.)

ARGUMENT

I.

CALIFORNIA PENAL CODE SECTION 12021 IS CONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED.

Petitioner contends that California Penal Code section 12021 is unconstitutional both on its face and as it was applied to petitioner. He bases this contention upon the allegation that petitioner was not given notice that his continued possession of a concealable firearm became illegal after his felony conviction notwithstanding that such prior possession was lawful. Petitioner also contends that California Penal Code section 12021 is unconstitutional because it does not require proof that petitioner had knowledge that his possession of the weapon was unlawful.

California Penal Code section 12021 provides, in part:

* * *

> "Any person who is not a citizen of the United States and any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or county, or who is addicted to the use of any narcotic drug, who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense . . . . "

Petitioner had been convicted of possession for sale of heroin (former California Health and Safety Code section 11500.5, now section 11351), in 1974. The trial court found that prior offense to be an "irreducible felony" such that the offense could not be denominated a misdemeanor.[1]

The California Court of Appeal, in rejecting petitioner's contention that the statute is unconstitutional as failing to require proof of knowledge by a convicted felon, that his possession of a firearm is illegal, stated:

> In People v. Mendoza, 251 Cal. App.2d 835, this statewide court held that under this section neither intent nor knowledge is an element of the offense. 'The only knowledge required is knowledge of the character of the object possessed; knowledge that the possession is illegal is unnecessary.' (Id. at 843.) Therefore, the fact that appellant claims that he had no knowledge of the prohibition is irrelevant.
>
> "This interpretation of the statute is constitutional. In Lambert v. California (1957) 355 U.S. 225 [2 L. Ed.2d 228], the United States Supreme

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[1] The penalty for possession for sale of heroin is from 5 to 15 years in state prison. (Calif. Health and Saf. Code § 11351.) Probation may, however, be granted. (Calif. Pen. Code § 1203.)

Court held that an ordinance which made it unlawful for any convicted person to remain in Los Angeles for more than five days was unconstitutional. The Court emphasized that the Lambert ordinance penalized the mere act of existing. No activity was required to violate the statute. (Id. at 229 [2 L. Ed.2d at 232].)

"The California Supreme Court, in determining the constitutionality of a gun registration law, noted that mere existence was not penalized. Rather, as in the present case, the penalty was imposed upon possession. (Galvan v. Superior Court, 70 Cal. 2d 851, 868.) 'Except under the unique circumstances of Lambert, knowledge of the law is not a requirement of due process.' (Id.) A defendant must have knowledge of the character of the object possessed; he or she need not have knowledge that the possession is illegal. (People v. Mendoza, supra, 251 Cal. App.2d at 843.) Therefore, the statute as interpreted is not unconstitutional."
(Appendix A., pp. 10-11.)

It appears that possession of *any* firearm by a convicted felon similarly may constitute criminal behavior under federal law. *See*, Appendix, 18 U.S.C. §§ 1201, 1202.[2]

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[2] Appendix, 18 U.S.C. § 1202 provides, in part:

"(a) Any person who –

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .

". . . .

"(5) . . . and who receives, possesses, or transports in commerce, . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

This statute has been held to pass constitutional muster, as there is no absolute constitutional right of an individual to possess firearms. *United States v. Day*, 476 F.2d 562, 567-68 (6th Cir. 1973).

Under Appendix, 18 U.S.C. § 1202(a), while a felon must knowingly possess a firearm to be guilty, he need not be aware that such possession is illegal nor need he be aware that his prior offense constituted a felony. *United States v. Crow*, 439 F.2d 1193, 1195-96 (9th Cir. 1971); *United States v. Snell*, 353 F. Supp. 280, 284 (U.S.D.C., Md., 1973). Appendix 18 U.S.C. § 1202 has been upheld as against a variety of constitutional challenges. *United States v. Donofrio*, 450 F.2d 1054, 1055-56 (5th Cir. 1971); *United States v. Karnes*, 437 F.2d 284, 289 (9th Cir. 1971); *cert. denied*, 402 U.S. 1008 (1971).

Thus respondent submits that California Penal Code section 12021 is a valid exercise of the police power of the state to protect its citizens from convicted felons. Contrary to ptitioner's contention that the California statute is unconstitutional by failing to require notice to the convicted felon, that specific point has been refuted in challenges to the parallel federal statute, *United States v. Leonard*, 455 F.2d 949, 950 (9th Cir. 1972), and in California. *People v. Mendoza*, 251 Cal. App.2d 835, 60 Cal. Rptr. 5. As to petitioner's suggestion that such statutes are unconstitutional as prohibiting merely "passive" conduct (*Lambert v. California*, 355 U.S. 225 (1957)), that contention was expressly refuted in *United States v. Crow, supra*, 439 F.2d 1193, 1196 (9th Cir. 1971).

Therefore, respondent submits that petitioner's challenges to California Penal Code section 12021 must, by a parity of reasoning, fail.

II.

THE SEIZURE OF THE FIREARMS FROM PETITIONER'S APARTMENT WAS PROPER.

Petitioner contends that the police lacked probable cause when they seized two firearms uncovered in his apartment during a consensual search for narcotics. Respondent submits the firearms were properly seized.

1. The Nexus Requirement of Warden v. Hayden Was Met.

In affirming the judgment, the California Court of Appeal found the guns were properly seized:

> "An officer may constitutionally search for instruments or fruits of a crime, contraband or evidence of criminal activity. (Warden v. Hayden (1967) 387 U.S. 294, 310 [18 L. Ed.2d 782, 793-94].) Appellant urges this court to require that an officer engaged in a search have probable cause (*i.e.*, specific articulable facts) to believe that items he uncovers are such evidence or instrumentalities before they can be seized.
>
> "We choose not to impose that requirement. Appellant's argument puts the cart before the horse. It would demand that an investigating officer know in advance and with substantial certainty which items will be of evidentiary use at trial. This creates a severe and illogical burden. The primary invasion of privacy occurs in the search itself. Seizure of items, subject to an accounting and eventual return to their owner, is not a new and independent infringement of constitutional rights which would justify the separate high standard of probable cause suggested by appellant. (See Warden v. Hayden, supra, 387 U.S. at 309-310 [18 L. Ed.2d at 793].)
>
> "We therefore hold that before an item discovered in the course of a lawful search can be seized, an officer needs only a reasonable belief that the item may be evidence of the commission of a crime. (See People v. Teale, 70 Cal.2d 497, 511.) In the instant case, the officer's investigative experience in narcotics cases made reasonable his seizure of the firearms." (Appendix A, pp. 8-9.)

The seizing officer had testified that he seized the guns because it had been his experience in narcotics investigations that guns discovered, frequently turned out to be stolen; the guns were seized to check that possibility. (CT 20.)[3]

Respondent notes that the trial record reflected the investigating officer had received information from a confidential reliable informant that petitioner was dealing in heroin from his apartment. (CT 6-7, RT 9.) That same officer had arrested a person under the influence of narcotics near petitioner's apartment who had stated he had purchased narcotics in petitioner's apartment. (RT 14-17.) The search of the apartment did not reveal narcotics but marijuana was discovered. Under these circumstances, it is submitted that the officer had reasonable cause to believe that the guns might be related to petitioner's alleged narcotics activities. Under California law, it is well established that facts which might not amount to probable cause in the eyes of the "ordinary man" may nevertheless provide such cause when gleaned by experienced police officers or narcotics officers. *People v. Medina*, 7 Cal.3d 30, 37; 101 Cal. Rptr. 521, 496 P.2d 433; *People v. Superior Court (Kiefer)*, 3 Cal.3d 807, 818, 819, 91 Cal. Rptr. 729, 478 P.2d 449. In view of the information relayed to the officer prior to the seizure, it is submitted the officer had rea-

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[3] In addition, although this point was not fully developed, petitioner's own testimony indicates that the officers were in fact aware of petitioner's prior felony conviction at the time of the seizure: "They were telling me that I was an ex-con with a gun and all that stuff, . . . " (RT 23.) This testimony occurred at the second motion to suppress.

sonable cause to believe the guns might be evidence of a crime. Accordingly, the guns were properly seized.

2. Seizure Of An Article As Possible Evidence, Distinct From The Search That Revealed The Article, Presents No Issue Cognizable Under The Fourth Amendment.

Respondent here urges that petitioner's claim that the gun should not have been introduced into evidence at trial, as it was improperly seized, does not present an issue under the Fourth Amendment. Rather, it is submitted that there is no constitutional issue of a seizure of an article without reference to the antecedent search. Thus, if a search is constitutionally valid, it is urged that no separate or distinct right to also litigate the constitutionality of an integral seizure lies; rather the sole challenges to the seizure *qua* seizure remaining available to a criminal defendant are on a state level only and procedural in nature; *viz*, petitioner could have moved to exclude the gun on relevancy grounds and/or he could have moved to have the subject property returned.

As this court has made clear, the right protected by the Fourth Amendment and the exclusionary rule, is the fundamental right to privacy. *Mapp v. Ohio*, 367 U.S. 643, 653 (1961). The historical view that the Fourth Amendment protects property rights has been largely rejected. *Warden v. Hayden*, 387 U.S. 294 (1967). Thus respondent submits, once privacy has been lawfully disturbed, as in the case of a consensual search, no additional preservation of the right to privacy would accrue were articles seized during such a search suppressed for a failure to demonstrate independent probable cause.

Thus, in the instant case, the gun was seized by the officer because it might have become relevant evidence in a subsequent criminal prosecution. His prediction in that regard proved correct. Nevertheless, to require a showing of independent probable cause to believe any particular article

seized during a search which was judicially declared valid, would unreasonably impede police investigation of crimes while adding absolutely nothing to the preservation of an individual's rights under the Fourth Amendment. Assuming that the seized article was not revealed during a constitutionally over-excessive or over-intensive search, the seizure of that article violates no fundamental right to privacy from official intrusion protected by the Constitution, since the search would have revealed the article in any event. However, to require a separate articulation of probable cause to seize any article during a search would impose extreme difficulty on an investigation, precisely because at the typical investigatory stage of a search, the potential relevancy of an article to be seized has not and cannot yet be determined.

This is not to say that any article may be seized by investigatory officers during a valid search. Were articles seized having no plausible relationship to the investigation at hand, that conduct alone would clearly serve to vitiate the reasonableness of the search itself, or could be said to violate the spirit of the consent to search previously given. Similarly, where a search becomes overly intense, such that the scope of the search exceeds its authorization, it has been held that any articles so seized must be suppressed. *Marron v. United States*, 275 U.S. 192, 196 (1927). But this is so, not because of a separate constitutional right to challenge the seizure *qua* seizure, but because the intensity of the search constitutes a violation of privacy rights, rendering the prior justification for the search void. *See Mapp v. Ohio, supra*, 367 U.S. 643, 646-47 (1961); *Boyd v. United States*, 116 U.S. 616, 630 (1886). Thus it is recognized that a search involves an invasion of privacy rights; the invasion must be justified or fruits of the invasion must be suppressed. However, as the seizure of an article of potential evidential value does not constitute a new invasion of privacy, it is submitted that no constitutional issue is presented in the case of a seizure, standing alone.[4]

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[4] Respondent also notes that certain cases which could be said to espouse the concept that seizures may present an independent Fourth

Thus, respondent submits that application of the exclusionary rule to the situation presented would not advance the cause of preservation of the right to privacy. In *United States v. Calandra*, 414 U.S. 338, 348 (1974), (concerning the use of illegally seized evidence in grand jury proceedings), this Court stated:

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence all proceedings or against all persons. As with any remedial service, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served . . . . " [5]

Here, where the officer who seized the guns believed they might be evidence of a crime, based upon his experience, and when the seizure did not constitute a separate or new invasion

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Amendment issue, in fact addressed situations where the search itself was not justified. *See e.g., Weeks v. United States*, 232 U.S. 383 (1914); *see also Linkletter v. Walker*, 381 U.S. 618, 621 (1965); *Mapp v. Ohio*, 367 U.S. 643, 644-45 (1961) *Elkins v. United States*, 364 U.S. 206, 207, 222 (1960); *Byars v. United States*, 273 U.S. 28, 29-30 (1927); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390 (1920). The California case which initially imposed the exclusionary rule in this state (*People v. Cahan*, 44 Cal.2d 434, 436-37, 282 P.2d 905 (1955)) also invoked illegal searches leading to seizure of evidence. Thus, respondent submits that Fourth Amendment challenges to seized evidence have historically been recognized only on the basis that such evidence was the fruit or product of a prior, illegal search. Accordingly, it appears that the prohibition against unreasonable searches and seizures should be read in the conjunctive such that seized evidence would be suppressed only where the overall conduct of the authorities is not reasonable. *But see People v. Hill*, 12 Cal.3d 731, 762-63, 117 Cal. Rptr. 393, 416-18, 528 P.2d 1, 24-26 (1974).

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[5] It must be noted that in *Calandra*, as in the cases set forth in footnote 4, supra, the search itself was invalid due to a defective warrant. *Id.* at 342.

of petitioner's right to privacy, it is submitted no benefit would be derived by suppression of the guns as evidence. *See generally United States v. Peltier*, 422 U.S. 531, 542 (1975).

In *Zap v. United States*, 328 U.S. 624 (1946), this Court, in rejecting a contention that an incriminating check seized during a valid search should have been suppressed, stated:

> "Weeks v. United States, 232 U.S. 383, held that private property obtained as a result of an unlawful search and seizure could not be used as evidence in a criminal prosecution of the owner. As explained in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, the evidence so obtained is suppressed on the theory that the Government may not profit from its own wrongdoing. But as stated in McGuire v. United States, supra, p. 99, 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' To require reversal here would be to exalt a technicality to constitutional levels. The search and the discovery were wholly lawful. A search warrant would be merely the means of insuring the production in court of the primary source of evidence otherwise admissible. Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts. We cannot extend the rule of the Weeks case so far as to bar absolutely the check itself. It was in the sound discretion of the District Court to admit it." 328 U.S. at 630. *See also United States v. Pardo-Bolland*, 229 F. Supp. 473, 476-77 (USDC

S.D. NY 1964), affirmed 348 F.2d 316 (2nd Cir. 1965), *cert. denied*, 382 U.S. 407, 444 (1965).

Accordingly, respondent submits that in seizing an article during a valid search, investigating officers need possess only such information linking the seized article to criminal behavior, as is necessary to prevent vitiation of the prior authorization for the search. As the California Court of Appeal stated:

> "We therefore hold that before an item discovered in the course of a lawful search can be seized, an officer needs only a reasonable belief that the item may be evidence of the commission of a crime." (Appendix A., p. 9.)

Therefore it is submitted that seizure of an article of potential evidential value during a valid search on less than probable cause, does not present a Fourth Amendment issue at all unless the action of the investigating officers is so unreasonable as to vitiate the prior consent or authority for the search. However, at bench, it is submitted the officer's prior experience, coupled with a highly limited seizure, did not transcend that standard. Accordingly, it is submitted that the gun seized from petitioner's apartment was properly introduced into evidence at trial.

III.

SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING OF THE TRIAL COURT THAT PETITIONER VOLUNTARILY CONSENTED TO THE SEARCH OF HIS APARTMENT.

Petitioner contends that the search of his apartment was improper because petitioner's consent to said search was not voluntary. In support of this contention, petitioner relies upon the fact that he resided in a "security building" in which he alleges he had an enhanced expectation of privacy. Petitioner also contends that his own testimony concerning

the giving of consent shows that said consent was not voluntary. Respondent submits that under the totality of the circumstances presented, the trial court's finding that petitioner voluntarily consented to the search, ought not to be disturbed.

Concerning petitioner's contention that the entry of the police into the common hallways of this locked "security building" constituted an unacceptable intrusion, that point was directly refuted by the Court of Appeal, which held that " . . . no constitutional infringement of privacy occurs when an officer enters a building through the outside security door and goes immediately to an apartment where he has business with a particular tenant." (Appendix A., p. 6.) *See also United States v. St. Clair* (USDC, S.D.N.Y. 1965), 240 F. Supp. 338, 340.

As to petitioner's contention that the consent to search was not voluntarily given, respondent submits that the totality of the circumstances presented demonstrate that the consent was in fact voluntary, as both the trial court and the Court of Appeal found. [See Appendix A., pp. 7-8.] As the determination is supported by substantial evidence, it should not be disturbed by this petition. *People v. West*, 3 Cal.3d 595, 602, 91 Cal. Rptr. 385, 477 P.2d 409; *People v. Smith*, 63 Cal.2d 779, 798, 48 Cal. Rptr. 382, 409 P.2d 222, *cert. denied* 338 U.S. 913 (1967). *United States v. Watson*, 423 U.S. 411, 424-25 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KENNETH LEROY HOWARD, Defendant and Appellant.	2D CRIM. NO. 28221 Sup. Ct. No. A-316527

ON REHEARING APPEAL from a Judgment of the Superior Court of Los Angeles County. Sam Bubrick, Judge. Affirmed.

Burton Marks and Jonathan K. Golden for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Howard J. Schwab and Alexander W. Kirkpatrick, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX "A"

Kenneth Leroy Howard appeals from a judgment of conviction of possession of a concealable firearm by a convicted felon. (Pen. Code, § 12021.) The appeal lies. (Pen. Code, § 1237, subd. (1).)

Appellant Howard contends that: (1) the police violated his constitutional rights when they illegally entered his apartment building through a locked security entrance; (2) they searched his apartment without his consent; and (3) they seized the guns they found in his apartment unconstitutionally. Each of these contentions is without merit.

Appellant's remaining arguments concern Penal Code section 12021. He urges that the section requires knowledge on the part of the convicted felon of his status and of the prohibition against possession of a firearm and that no proof of such knowledge was introduced at his trial. Alternatively, appellant argues that Penal Code section 12021 is unconstitutional if it is interpreted not to require such knowledge on the part of a defendant-felon. Both of these arguments also lack merit. We will therefore affirm the judgment of conviction.

STATEMENT OF FACTS[1/]

On the afternoon of March 17, 1975, Los Angeles police officers went to an apartment building on Kingsley Avenue to investigate tips received from two informers that a black male by the name of Howard was selling heroin and using a certain apartment as a "shooting gallery."

Admission to the hallways of this building could be gained only through a locked door opened by key or buzzer activated by someone in an apartment. The officers did not use a key or seek a buzzer signal from any occupant. Instead, they simply entered the building at the same time someone else opened the door thereof. One of the officers, however, testified that the managers of many security buildings in the area, including appellant's building, had given the police keys to the outside doors.

The officers went immediately to appellant's apartment, identified themselves and their purpose, and asked to

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1/ We construe all facts in the light most favorable to the People as the prevailing party below. (People v. Vann, 12 Cal.3d 220, 225.)

come inside. Appellant replied, "Come on in." Once inside, the officers asked for and received appellant's permission to search the apartment.

The search revealed marijuana, a rifle, and a Colt revolver. All of these items were seized. One of the officers testified that although he had no particular suspicion that the guns were stolen, it had been his experience in narcotics investigations that guns discovered in the course of such investigations frequently turn out to have been stolen.

Testifying in his own defense, appellant stated that he had not given permission to the police to search the apartment. He also stated that while police were interrogating him, his girl friend entered the apartment and told police that she owned the marijuana. Appellant admitted that he was the registered owner of both firearms, but claimed to have no knowledge that they were at the Kingsley apartment. He had purchased them before he was arrested and convicted of a felony and said he had no knowledge that he was thereafter prohibited from owning them.

DISCUSSION

I. Appellant's Constitutional Rights Were Not Violated By Police Entry Through the Outside Apartment Security Entrance.

In People v. Seals, 263 Cal.App.2d 575, 577, this

statewide court held that officers can constitutionally enter apartment hallways and other common areas without a warrant or express permission from particular tenants. In the present case, however, officers gained entry to the hallway through a locked door. Appellant argues that in doing so the police committed a trespass in violation of his constitutional rights of privacy and freedom from unreasonable search and seizure.

For several reasons, however, we are convinced that under the facts of this case no constitutional violations occurred. First, one of the officers testified that the building's manager had given him a key to the outside door. Even though the key was not used on this particular occasion, its possession by the officers was unrebutted evidence that the police had the manager's permission to enter in the course of their duties. Appellant cannot presume to control the right of other tenants, or particularly the manager as the owner's agent, to authorize entry to the building's common areas by nontenants. (See People v. Cruz, 61 Cal.2d 861, 866-867; People v. Egan, 250 Cal.App.2d 433, 436; cf. People v. Baker, 12 Cal.App.3d 826, 836.)

Second, we do not believe that the locked outside door established the same sanctity for the hallways and common

areas as is established for individual apartments by the doors to those apartments. An outside security door is designed to prevent persons roaming through the apartment buildings for solicitation or perhaps criminal purposes. But no constitutional infringement of privacy occurs when an officer enters a building through the outside security door and goes immediately to an apartment where he has business with a particular tenant. (United States v. St. Clair (S.D.N.Y. 1965) 240 F.Supp. 338, 340.)[2/] Even the tenant to be visited can easily avoid the visitor by not answering his door.

Finally, we note that even if the initial entry by the officers were trespassory, it would not invalidate the subsequent search of appellant's apartment because, as we will discuss below, consent therefor was freely given by appellant. His opportunity to make an intelligent decision as to whether he would consent to the search was in no way impaired by the

2/ The St. Clair case involved precisely the type of apartment security entrance involved in the instant case. Although apparently no California case has dealt with the identical question, our Supreme Court has cited the St. Clair decision for the general proposition that police officers may constitutionally enter common hallways of apartment buildings without a warrant or express permission. (See People v. Terry, 70 Cal.2d 410, 427.) For a thorough discussion of other federal and state court decisions in conformity with St. Clair, see People v. Seals, supra, 263 Cal.App.2d at 578-579.)

fact that the officers first made contact with him by knocking on his apartment door rather than by buzzing him at the outside entrance. (Cf. People v. Haven, 59 Cal.2d 713, 718 (sudden confrontation by officers who had illegally entered defendant's house vitiated consent to search); People v. Lawler, 9 Cal.3d 156, 164 (consent obtained following illegal search held invalid).) A simple trespass alone will not invalidate a subsequent search which is otherwise proper. (People v. Terry, supra, 70 Cal.2d at 427; People v. Medina, 26 Cal.App.3d 809, 817; People v. Seals, supra, 263 Cal.App.2d at 579.)

II. Substantial Evidence Supports the Conclusion that Appellant Consented to the Search of His Apartment.

Testimony of the police officer regarding appellant's consent to search was unequivocal. Even defendant's own testimony can be interpreted an indicative of consent.[3/] As an

3/ "Q. [by Prosecutor]: Did I understand you correctly that you may have said 'You might as well search' at some point?

"A. [by Appellant]: At the time they was coming in, and the investigation, I have no way of stopping them from searching.

"Q. So you said, 'You might as well search?'

"A. I did make that statement.

"Q. That was after the officers asked you if they could search?

"A. No. They was -- Yeah, I guess so."

appellate court, we are bound by this determination since it is supported by substantial evidence. (People v. West, 3 Cal.3d 595, 602; People v. Smith, 63 Cal.2d 779, 798, cert. den. 388 U.S. 913 [18 L.Ed.2d 1353]; People v. Brown, 19 Cal.App.3d 1013, 1018.)

III. Seizure of the Guns Was Constitutional.

An officer may constitutionally search for instruments or fruits of a crime, contraband or evidence of criminal activity. (Warden v. Hayden (1967) 387 U.S. 294, 310 [18 L. Ed.2d 782, 793-794].) Appellant urges this court to require that an officer engaged in a search have probable cause (i.e., specific articulable facts) to believe that items he uncovers are such evidence or instrumentalities before they can be seized.

We choose not to impose that requirement. Appellant's argument puts the cart before the horse. It would demand that an investigating officer know in advance and with substantial certainty which items will be of evidentiary use at trial. This creates a severe and illogical burden. The primary invasion of privacy occurs in the search itself. Seizure of items, subject to an accounting and eventual return to their owner, is not a new and independent infringement of constitutional rights which would justify the separate high standard

of probable cause suggested by appellant. (See Warden v. Hayden, supra, 387 U.S. at 309-310 [18 L.Ed.2d at 793].)

We therefore hold that before an item discovered in the course of a lawful search can be seized, an officer needs only a reasonable belief that the item may be evidence of the commission of a crime. (See People v. Teale, 70 Cal.2d 497, 511.) In the instant case, the officer's investigative experience in narcotics cases made reasonable his seizure of the firearms.

IV. Penal Code Section 12021 Does Not Require Knowledge on the Part of the Convicted Felon and, As So Interpreted, Is Not Unconstitutional.

Appellant's final contention is twofold. First, he argues that no evidence was introduced at trial that he was aware of the prohibition Penal Code section 12021 [4/] placed upon him as a felon. Alternatively he asserts that if he could be convicted under this section without proof of knowledge of the prohibition or his status as a convicted felon,

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4/ Penal Code section 12021 states in pertinent part:

"(a) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, . . . who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense. . . ."

then he was denied due process of law.

In People v. Mendoza, 251 Cal.App.2d 835, this statewide court held that under this section neither intent nor knowledge is an element of the offense. "The only knowledge required is knowledge of the character of the object possessed; knowledge that the possession is illegal is unnecessary." (Id. at 843.) Therefore, the fact that appellant claims that he had no knowledge of the prohibition is irrelevant.

This interpretation of the statute is constitutional. In Lambert v. California (1957) 355 U.S. 225 [2 L.Ed.2d 228], the United States Supreme Court held that an ordinance which made it unlawful for any convicted person to remain in Los Angeles for more than five days was unconstitutional. The Court emphasized that the Lambert ordinance penalized the mere act of existing. No activity was required to violate the statute. (Id. at 229 [2 L.Ed.2d at 232].)

The California Supreme Court, in determining the constitutionality of a gun registration law, noted that mere existence was not penalized. Rather, as in the present case, the penalty was imposed upon possession. (Galvan v. Superior Court, 70 Cal.2d 851, 868.) "Except under the unique circumstances of Lambert, knowledge of the law is not a requirement

of due process." (Id.) A defendant must have knowledge of the character of the object possessed; he or she need not have knowledge that the possession is illegal. (People v. Mendoza, supra, 251 Cal.App.2d at 843.) Therefore, the statute as interpreted is not unconstitutional.

Additionally, appellant asserts that he had no knowledge of his status as a convicted felon and relies on People v. Bray, 52 Cal.App.3d 494. That case, however, is distinguishable from the present case. In Bray, the court held that because the defendant was ignorant of the facts necessary to come within the statutory prohibition of section 12021, instructions on mistake or ignorance of fact should have been given. The court indicated that no one was sure of the defendant's status and clearly limited the holding to the unique facts of the case. (Id. at 499.) In the present case, the record shows that similar ignorance of or confusion in regard to the facts which would warrant such a defense did not exist. No true issue of knowledge was presented since appellant admitted that he had been convicted of a felony.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

COBEY, Acting P.J.

We concur:

ALLPORT, J.

POTTER, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

DEC 22 1976

I have this day filed Order HEARING DENIED

In re: 2 Crim. *No.* 28221

People

vs.

Howard

Respectfully,

G. E. BISHEL
Clerk

42335-977 8-76 3M OBP

APPENDIX "B"